

No. 11743

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

EMPLOYERS' FIRE INSURANCE COMPANY,
THE AUTOMOBILE INSURANCE COMPANY
OF HARTFORD and WESTCHESTER FIRE
INSURANCE COMPANY,

Appellants,

vs.

UNITED STATES OF AMERICA, CHARLES RUS-
CONI, as Administrator of the Estate of Tillie
Rusconi, sometimes known as T. Rusconi, Mrs.
Felippo Rusconi, Mrs. F. Rusconi and Mrs. Philip
Rusconi, Deceased, FILIPPO RUSCONI, THELMA
RUSCONI SMITH, EILLIEN RUSCONI GOOD-
WIN and CHARLES RUSCONI,

Appellees.

TRANSCRIPT OF RECORD

Upon Appeal from the District Court of the United States
for the Southern District of California,
Central Division

FILED

NOV 21 1947

PAUL P. O'BRIEN,
CLERK.

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italics; and likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible an omission from the text is indicated by printing in italics the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS:

For Appellants:

LONG & LEVIT

210 West Seventh Street

Los Angeles 14, Calif.

For Appellee United States of America:

JAMES M. CARTER

United States Attorney

RONALD WALKER

CLARKE E. STEPHENS

Assistants U. S. Attorney

600 U. S. Post Office and Court House Building

Los Angeles 12, Calif.

For Appellees Charles Rusconi, etc. et al.:

BISHOP & HOFFMANN

THOMAS P. WELDON

215 West Fifth Street

Los Angeles 13, Calif. [1*]

In the District Court of the United States for the
Southern District of California
Central Division

No. 7046-B

CHARLES RUSCONI, as Administrator of the Estate
of Tillie Rusconi, sometimes known as T. Rusconi,
Mrs. Felippo Rusconi, Mrs. F. Rusconi and Mrs.
Philip Rusconi, Deceased, FILIPPO RUSCONI,
THELMA RUSCONI SMITH, EILLIEN RUS-
CONI GOODWIN and CHARLES RUSCONI,
Plaintiffs,

vs.

UNITED STATES OF AMERICA,
Defendant.

COMPLAINT FOR MONEY
(for negligence)

With Endorsement of Demand for Trial by Jury

I.

That plaintiff Charles Rusconi at all times herein mentioned, was, ever since has been and still is the regularly appointed, empowered and acting Administrator of the Estate of Tillie Rusconi, sometimes known as T. Rusconi, Mrs. Felippo Rusconi, Mrs. F. Rusconi and Mrs. Philip Rusconi, deceased. That plaintiff Filippo Rusconi is the surviving spouse of said Tillie Rusconi, and that plaintiffs Thelma Rusconi Smith, Eillien Rusconi Goodwin and Charles Rusconi are adult children of Tillie Rusconi and plaintiff Filippo Rusconi, and that the plaintiffs Filippo Rusconi, Thelma Rusconi Smith, Eillien Rusconi [2] Goodwin and Charles Rusconi are all the heirs

at law of Tillie Rusconi, deceased, and that each of the plaintiffs is a resident of the County of Santa Barbara, Southern District of California, Central Division. That this action is brought under and pursuant to the "Federal Tort Claims Act."

II.

That on January 30th, 1945, defendant, by and through Elmer R. Steffey, a member of the military forces of the United States, who was then and there an employee of the defendant, to-wit, a 2nd Lieutenant of the United States Army Air Corp then and there stationed at the Santa Maria Army Air Field, and acting in line of duty and within the scope of his office and employment and not engaged in combat activities of said military forces, and then and there on a training maneuver, so negligently and carelessly operated and maintained a certain aircraft, to-wit, a P-38 airplane then and there belonging to the defendant, United States government, so that the same hit, struck and collided with a certain building in Santa Maria, California, commonly known as Rusconi's Cafe, causing the death of said Tillie Rusconi.

III.

That said Tillie Rusconi was of the age of 50 years or thereabouts at the time of her death and had a life expectancy of over 20 years, and that immediately prior to the aforesaid collision she was in good physical and mental health and condition.

IV.

That said Tillie Rusconi was a loving and devoted wife and mother, and that by reason of the negligence of the defendant as aforesaid, plaintiffs have been deprived of

her love, comfort, society, and affection, and in addition, plaintiff Filippo Rusconi has been deprived of her consortium, all to plaintiffs' damage in the sum of \$25,000.00.

V.

That by reason of the negligence of the defendant as aforesaid, and as a proximate result thereof, it was necessary [3] for plaintiffs to incur, and they did incur, burial and gurnal expenses on behalf of said Tillie Rusconi in the sum of \$1,362.15 which sum was and is the reasonable value of said burial and funeral expenses.

VI.

That at the time of said collision as aforesaid, said Tillie Rusconi and plaintiff Filippo Rusconi were the owners of and were operating a certain business in the aforesaid building, which said building was the community property of said Tillie Rusconi, now deceased, and plaintiff Filippo Rusconi. That by reason of the negligence of the defendant and as a proximate result thereof, community personal property of said Tillie Rusconi and plaintiff Filippo Rusconi situated in said building, including business fixtures and stock in trade, was damaged or totally destroyed, to the further damage of the Estate of Tillie Rusconi, deceased, and plaintiffs Charles Rusconi as such Administrator and Filippo Rusconi in the further sum of \$33,379.02, and as a further proximate result thereof, said estate and plaintiffs incurred a further cost and expense of salvaging and removing injured, damaged and destroyed personalty from the building following the aforesaid collision, to their further damage in the sum of \$200.67, which is and was the reasonable value of such removal and salvaging.

VII.

That as alleged in Paragraph VI hereof, the deceased, Tillie Rusconi, and plaintiff Filippo Rusconi were operating a certain business which was known as "Rusconi's Cafe," in the aforesaid building, and were in possession thereof under a lease in writing, the term of which would not expire for the next subsequent nineteen calendar months, and were making and receiving a profit from said business of an average of \$2,920.06 per month. That by reason of and as a direct and proximate cause [4] of said negligence of the defendant, said building was totally destroyed, and by reason thereof, said lease became and was terminated, and the Estate of Tillie Rusconi and plaintiffs Filippo Rusconi and Charles Rusconi as such Administrator, were wholly deprived of and lost the profits which would, but for said collision and destruction, have been made and realized during a term of seven months, being the term during which it was impossible to operate said business, to their damage in the further sum of \$20,440.42, and that as a further direct and proximate cause of said negligence of the defendant, and the destruction of said building and the personal property then therein situated, being the fixtures and stock in trade of said business, said plaintiffs lost good will and patronage and the value of the leasehold for the remainder of said term, to their further damage in the sum of \$10,000.00.

VIII.

That at the time of her death said Tillie Rusconi was capable of earning and was then and there earning more than \$1,000 a month; that said earnings were the community property of the deceased and plaintiff Filippo

Rusconi; that at the time of her death, she had a life expectancy of over 20 years; and that by reason of the negligence of defendant and as a direct result of the aforesaid collision and death of said Tillie Rusconi, plaintiff Filippo Rusconi was and is damaged in the further sum of \$30,000.00.

IX.

That plaintiffs have been required to and have engaged the services of Sylvester Hoffmann and Irving G. Bishop, Esqs. (practicing under the firm name of "Bishop & Hoffmann"), each of whom is an attorney at law, admitted to practice before this Court, and of Thomas P. Weldon, of Counsel, a member of the State Bar of California, and have incurred an obligation to [5] pay said attorneys a reasonable fee as and for their services; that plaintiffs are informed and believe and upon such information and belief allege that an aggregate sum equal to twenty per centum (20%) of the amount recovered is and was a reasonable fee for the services rendered and to be rendered by plaintiffs' attorneys in this action.

Wherefore, plaintiffs demand judgment against defendant—

1. In favor of plaintiffs Filippo Rusconi, Thelma Rusconi Smith, Eillien Rusconi Goodwin and Charles Rusconi, in the sum of \$26,362.15;

2. In favor of plaintiffs Charles Rusconi, as Administrator of the Estate of Tillie Rusconi, sometimes known as T. Rusconi, Mrs. Felippo Rusconi, Mrs. F. Rusconi and Mrs. Philip Rusconi, deceased, and Filippo Rusconi in the further sum of \$64,020.11;

3. In favor of plaintiff Filippo Rusconi in the further sum of \$30,000.00;

4. In favor of each and all of the plaintiffs for their costs of suit;

5. That the Court fix and determine the reasonable value of the services rendered and to be rendered by Bishop & Hoffmann and Thomas P. Weldon, at twenty percentum (20%) of the amounts recovered by any one or more of the plaintiffs, to be paid therefrom as provided by Section 422 of the aforesaid Act; and

6. For general relief.

BISHOP & HOFFMANN

(and THOMAS P. WELDON, of Counsel)

By Irving G. Bishop

Attorneys for Plaintiffs [6]

DEMAND FOR TRIAL BY JURY

Come now the plaintiffs and demand a trial of this cause before and by a jury.

BISHOP & HOFFMANN

(and THOMAS P. WELDON, of Counsel)

By Irving G. Bishop

Attorneys for Plaintiffs [7]

[Verified.]

[Endorsed]: Filed May 27, 1947. [8]

[Title of District Court and Cause]

SUMMONS

To the Above Named Defendant:

You are hereby summoned and required to serve upon Bishop & Hoffmann, plaintiff's attorneys, whose address is 215 W. 5th Street, Rm. 810, Los Angeles 13, California, an answer to the complaint which is herewith served upon you, within 60 days after service of this summons upon you, exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint.

[Seal of Court]

EDMUND L. SMITH

Clerk of Court

By Charles A. Seitz

Deputy Clerk

Date: May 27, 1947.

Note.—This summons is issued pursuant to Rule 4 of the Federal Rules of Civil Procedure. [9]

RETURN ON SERVICE OF WRIT

United States of America,
Southern District of California—ss:

I hereby certify and return that I served the annexed Summons and Complaint on the therein-named United States of America by ~~handing to and leaving~~ mailing by registered mail a true and

correct copy thereof ~~with~~ to the U. S. Attorney General personally at Washington, D. C. ~~in said District~~ on the 28th day of May, 1947.

ROBERT E. CLARK

U. S. Marshal

By Dwight P. Snyder

Deputy

Marshal's Fees \$4.00. Mileage \$..... Expenses \$.30.
Total \$4.30. [10]

RETURN ON SERVICE OF WRIT

United States of America,
Southern District of California—ss:

I hereby certify and return that I served the annexed Summons and Complaint on the therein-named United States of America by handing to and leaving a true and correct copy thereof with Gertrude M. Johnson, Clerk, U. S. Attorney's Office, Los Angeles, authorized to accept service for U. S. Attorney personally at Los Angeles in said District on the 28th day of May, 1947.

ROBERT E. CLARK

U. S. Marshal

By Dwight P. Snyder

Deputy [11]

[Endorsed]: Filed Jun. 18, 1947. [12]

[Title of District Court and Cause]

MOTION BY EMPLOYERS' FIRE INSURANCE
COMPANY, THE AUTOMOBILE INSURANCE
COMPANY OF HARTFORD, AND WEST-
CHESTER FIRE INSURANCE COMPANY TO
INTERVENE AS PLAINTIFFS

Employers' Fire Insurance Company, The Automobile Insurance Company of Hartford, and Westchester Fire Insurance Company, move the Court for leave to intervene as plaintiffs in this action and in support of their motion allege and show as follows:

I.

The above entitled cause was commenced in this Court by the filing of complaint on the 27th day of May, 1947. Defendant has been served with process, but has not yet filed its answer.

II.

By their complaint, plaintiffs seek to recover damages [13] against defendant under Public Law 601, Chapter 753 known as the Federal Tort Claims Act. Said damages are alleged to have arisen out of the negligent maintenance and operation of a United States Army airplane by an employee of the defendant on January 30, 1945, as a result of which said airplane crashed into a building at Santa Maria, California, thereby damaging, among other things, certain business fixtures and stock in trade belonging to plaintiff Filippo Rusconi and Tillie Rusconi, deceased (represented in this action by Charles Rusconi, Administrator of her estate).

III.

Prior to the said 30th day of January, 1945, your petitioners had each issued a policy or policies of fire insurance covering said business fixtures or stock in trade to the owners thereof, which said policies of insurance were in full force and effect at the time of said airplane crash, all as more particularly appears from the proposed complaint in intervention of petitioners, the original of which is hereto attached and to which reference is hereby made the same as though herein set forth in full. That, as appears from said proposed complaint in intervention, as a result of the damage to said property caused by said airplane crash, and pursuant to the provisions of said policies, petitioners made the following payments to their respective assureds:

<u>Petitioner</u>	<u>Amount</u>
Employers' Fire Insurance Company	\$2,500.00
Automobile Insurance Company of Hartford	1,600.00
Westchester Fire Insurance Company	5,000.00

By virtue of said payments, petitioners, to the extent of such payments, became subrogated to all rights of their respective assureds against defendant for the damage to said property.

IV.

Petitioners and each of them are entitled to intervene herein under Rule 24(a) because: a) The representation of the [14] interest of each petitioner by plaintiffs is or may be inadequate and each petitioner is or may be bound by a judgment in this action;

b) The complaint herein was filed without the knowledge or consent of petitioners or any of them and it is the desire of petitioners and each of them that they be represented by counsel of their own choosing;

c) In the event of a judgment herein for plaintiffs for less than the value of said property as alleged in the complaint, a dispute may arise between plaintiffs and petitioners as to the distribution of such amount between plaintiffs and petitioners, and such dispute can be avoided if petitioners are permitted to intervene herein.

V.

Petitioners and each of them should be permitted to intervene herein under Rule 24(b) in that their claims and each of them and the main action have questions of law and fact in common as more particularly appears from the proposed complaint in intervention and the complaint herein.

VI.

Petitioners and each of them are entitled to intervene herein under Rules 17, 19, 20 and 21 in that petitioners are real parties in interest herein.

VII.

The granting of this motion will not to any extent delay or prejudice the adjudication of the rights of plaintiffs or defendant.

VIII.

This motion will be made upon all pleadings and papers on file herein and the affidavit of William H. Levit filed herewith.

Wherefore, petitioners and each of them pray that this Court make an order granting them and each of them permission to file the attached complaint in intervention against defendant, and [15] for such other and further relief as to this Court seems just.

Dated: July 11, 1947.

LONG & LEVIT

By William H. Levit

Attorneys for Petitioners

NOTICE OF MOTION

To Sylvester Hoffmann and Irving G. Bishop, Attorneys for Plaintiffs. James M. Carter, Esq., United States Attorney, Attorney for Defendant.

Please take notice that the undersigned will bring the above motion on for hearing before this Court in the courtroom of Honorable Campbell E. Beaumont, United States District Judge, located in the United States Post-office and Court House Building, Los Angeles, California, on the 21st day of July, 1947, at 10:00 o'clock A. M. of said day or as soon thereafter as counsel can be heard.

LONG & LEVIT

By William H. Levit

Attorneys for Petitioners

STATEMENT OF REASONS AND MEMORAN-
DUM OF POINTS AND AUTHORITIES IN
SUPPORT OF MOTION TO INTERVENE

1. Petitioners having paid a portion of plaintiffs alleged loss thereby became subrogated to plaintiffs' rights against defendant. Having become so subrogated petitioners are certainly proper, and probably necessary, parties to this litigation and should be permitted to intervene therein to properly assert and protect their rights.

Sloan v. Appalachian Electric Power Co., (USDC, W. Va.), 27 Fed. Supp. 108 [16]

Williams v. Powers, (USDC, Ohio), 2 F. R. D. 362

and see also footnote #94, 6 Cyc. of Fed. Proc. (2nd Ed.), p. 137, where it is stated:

"Under present procedure, there seems no reason why in such cases insurer and insured would not both be necessary parties and in position to sue, the one joining the other or showing, in accordance with Rule 19, why they are not joined."

2. Since the cause of action arose in California, it is pertinent to refer to the following California authorities which hold that the insurer is a proper party to an action to recover from a wrongdoer where it has paid a portion of the loss.

Fairbanks v. S. F. Ry. Co., 115 Cal. 579, 47 P. 450

Offer v. Superior Court, 194 Cal. 114, 228 P. 11

3. That petitioners are real parties in interest under Rule 17(a), see:

Williams v. Powers, *supra*

Fairbanks v. S. F. Ry. Co., *supra*

Offer v. Superior Court, *supra*

Respectfully submitted,

LONG & LEVIT

By William H. Levit

Attorneys for Petitioners

Receipt of copies of the following is hereby acknowledged: Motion of Employers' Fire Insurance Company, The Automobile Insurance Company of Hartford, and Westchester Fire Insurance Company to intervene as plaintiffs. Notice of Motion. Statement of Reasons and memorandum of points and authorities in Support of Motion to Intervene. [17] Complaint in Intervention. Affidavit of William H. Levit. July 11, 1947. Sylvester Hoffmann and Irving G. Bishop; by Irving G. Bishop, Attorneys for Plaintiffs. July 11, 1947. James M. Carter, United States Attorney; by Gertrude M. Johnson, Attorney for Defendant.

[Endorsed]: Filed Jul. 11, 1947. [18]

[Title of District Court and Cause]

AFFIDAVIT OF WILLIAM H. LEVIT IN
SUPPORT OF MOTION TO INTERVENE

State of California

County of Los Angeles—ss

William H. Levit being first duly sworn deposes and says:

That he is a member of the firm of Long & Levit, attorneys for petitioners and makes this affidavit for and on behalf of petitioners in support of their motion to intervene herein.

That the complaint herein was filed without the knowledge or consent of petitioners and it is the desire of petitioners that in the prosecution of their claims against defendant, they be represented by their own counsel, viz., the law firm of Long & Levit.

That the amount claimed in plaintiffs' complaint for damage to their business fixtures and stock in trade, viz., the sum of [19] \$33,379.02, is in excess of the amount agreed upon between plaintiffs and petitioners as the amount of damage to such property in adjusting the loss under the policies of insurance issued by petitioners to plaintiffs, said amount so agreed upon being the sum of \$23,403.11.

That by reason of such difference in alleged values, the interests of petitioners cannot be adequately protected herein unless they are permitted to intervene herein.

WILLIAM H. LEVIT

Subscribed and sworn to before me this 11th day of July, 1947.

(Seal)

RUTH E. SPANGLER

Notary Public in and for the County of Los Angeles,
State of California

My Commission Expires June 9, 1950.

[Endorsed]: Filed Jul. 11, 1947. [20]

In the District Court of the United States for the
Southern District of California
Central Division

No. 7046-B

CHARLES RUSCONI, as Administrator of the Estate
of Tillie Rusconi, etc., Deceased, et al.,
Plaintiffs,

v.

UNITED STATES OF AMERICA,

Defendant.

EMPLOYERS' FIRE INSURANCE COMPANY, a
corporation, THE AUTOMOBILE INSURANCE
COMPANY OF HARTFORD, a corporation,
WESTCHESTER FIRE INSURANCE COM-
PANY, a corporation,

Plaintiffs in Intervention,

v.

UNITED STATES OF AMERICA,

Defendant.

COMPLAINT IN INTERVENTION

Now come plaintiffs in intervention and allege as fol-
lows:

I.

That plaintiff in intervention, Employers' Fire Insurance [21] Company is and was at all times herein mentioned, a corporation organized and existing under and by virtue of the laws of the State of Massachusetts and authorized to transact the business of fire insurance in and by the State of California; that plaintiff in intervention, The Automobile Insurance Company of Hartford is and was at all times herein mentioned, a corporation organized and existing under and by virtue of the laws of the State of Connecticut and authorized to transact the business of fire insurance in and by the State of California; that plaintiff in intervention Westchester Fire Insurance Company is and was at all times herein mentioned, a corporation organized and existing under and by virtue of the laws of the State of New York and authorized to transact the business of fire insurance in and by the State of California.

II.

That prior to the 30th day of January, 1945, plaintiffs in intervention had issued policies of fire insurance on the California Standard Form to F. Rusconi, Tillie Rusconi and Charles Rusconi, dba Rusconi's Cafe, located at No. 112 South Broadway Street, Santa Maria, California, insuring the property and in the amounts hereinafter set forth and while located at said address:

<u>Company</u>	<u>Policy No.</u>	<u>Insures</u>	<u>Amount</u>
Employers' Fire Insurance Company	400211	Furniture & Fixtures	\$ 500.00
Employers' Fire Ins. Co.	400189	Furniture & Fixtures	2,000.00
The Automobile Ins. Co. of Hartford	419265	Furniture & Fixtures	1,600.00
Westchester Fire Ins. Co.	537489	Merchandise & Stock	5,000.00

that said policies of insurance and each of them were in full force and effect on the 30th day of January, 1945.

III.

That on the 30th day of January, 1945, and in the performance of the acts hereinafter referred to, Second Lieutenant Elmer [22] R. Steffey of the United States Army Air Force was an employee of the defendant stationed at the Santa Maria Air Base, and engaged in the course and scope of his said employment; that at all times herein mentioned defendant was the owner and operator of a certain P-38 airplane assigned to the United States Army Air Force at the Santa Maria Air Base; that on the 30th day of January, 1945 said Second Lieutenant Elmer R. Steffey, and while engaged in the course and scope of his employment by defendant, as aforesaid, was operating the aforementioned airplane in the vicinity of Santa Maria, California; that at the said time and place defendant so negligently and carelessly operated and maintained said airplane that it fell onto and collided with the buildings located at Nos. 112 and 114 South Broadway Street, Santa Maria, California; thereby causing a fire to break out in said buildings; that said crash, collision and fire were proximately caused by the negligence and carelessness of defendant as aforesaid.

IV.

That said fire, so caused by the negligence and carelessness of defendant, as aforesaid, damaged the furniture, fixtures, merchandise and stock insured by plaintiffs

in intervention as aforesaid and which were then and there located in the building at No. 112 South Broadway Street, Santa Maria, California; that as a result of said fire damage, and in accordance with the provisions of said policies of insurance, plaintiffs in intervention paid to their said respective insureds, the following sums:

<u>Company</u>	<u>Policy No.</u>	<u>Amt. Pd.</u>	<u>Date Pd.</u>
Employers, Fire Ins. Co.	400211	\$ 500.00	2/11/46
Employers' Fire Ins. Co.	400189	2,000.00	2/11/46
The Automobile Ins. Co. of Hartford	419265	1,600.00	4/12/45
Westchester Fire Ins. Co.	537489	5,000.00	7/13/45

that the damage to said furniture, fixtures, merchandise and stock, respectively, so caused by said fire, as aforesaid, was not less than [23] the amounts so paid by plaintiffs in intervention under their respective policies.

V.

That by virtue of said payments and as provided in each of said policies, plaintiffs in intervention became subrogated, to the extent of their respective payments, to all of the rights of their assureds against defendant for the damage to said furniture, fixtures, merchandise and stock.

VI.

That on the 20th day of June, 1947, plaintiffs in intervention and each of them, filed claims with the War Department for the damage so caused by defendant as aforesaid; that on the 25th day of June, 1947, plaintiffs in intervention, and each of them, filed with the War Depart-

ment, notice of withdrawal of said claims effective fifteen (15) days from said date.

VII.

That Santa Maria, California, is and was on the 30th day of January, 1945, located in the Southern District of California, Central Division; that this Honorable Court is given original jurisdiction of the claims herein set forth under the provisions of Public Law 601, Chapter 753, known as the Federal Tort Claims Act.

Wherefore, plaintiffs in intervention pray for judgment against defendant as follows:

1. In favor of Employers' Fire Insurance Company in the sum of \$2,500.00.
2. In favor of The Automobile Insurance Company of Hartford in the sum of \$1,600.00.
3. In favor of Westchester Fire Insurance Company in the sum of \$5,000.00.
4. For a reasonable attorneys' fee to be paid out of said recovery to their attorneys.
5. For costs of suit and such other and further relief [24] as may seem proper.

LONG & LEVIT

By William H. Levit

Attorneys for Plaintiffs in Intervention

[Verified.]

[Endorsed]: Lodged Jul. 11, 1947. [25]

In the District Court of the United States
Southern District of California
Central Division

No. 7046-B

CHARLES RUSCONI, as Administrator of the Estate
of Tillie Rusconi, sometimes known as T. Rusconi,
et al.,

Plaintiffs,

v.

UNITED STATES OF AMERICA,

Defendant.

ORDER

This cause having heretofore come before the court for hearing on motion of Employers' Fire Insurance Company, a corporation, The Automobile Insurance Company of Hartford, a corporation, and Westchester Fire Insurance Company, a corporation, for leave to intervene as parties plaintiff, and the motion having been heard and submitted for decision, and it appearing to the court that the Federal Tort Claims Act [28 U. S. C., §931] does not expressly grant consent to suit by the subrogee of a claimant [cf. 31 U. S. C., §203], and that consent of the Government to be sued, being a relinquishment of sovereign immunity, must be strictly interpreted [United States v. Sherwood, 312 U. S. 584, 590 (1940); Defense Supplies Corporation v. [26] United States Lines Co., 148 F. (2d) 311, 312 (C. C. A. 2nd, 1945)];

It Is Now Ordered that the motion of Employers' Fire Insurance Company, a corporation, The Automomile Insurance Company of Hartford, a corporation, and Westchester Fire Insurance Company, a corporation, for leave

to intervene as parties plaintiff in this action be and is hereby denied.

It Is Further Ordered that the Clerk this day forward copies of this order by United States mail to the attorneys for the parties appearing in this cause.

Dated: July 28, 1947.

WM. C. MATHES

United States District Judge

Judgment entered Jul. 28, 1947. Docketed Jul. 28, 1947. Book 11, page 63 A Edmund L. Smith, Clerk; By Theodore Hocke, Deputy.

[Endorsed]: Filed Jul. 28, 1947. [27]

[Title of District Court and Cause]

NOTICE OF APPEAL TO CIRCUIT COURT
OF APPEALS

Notice Is Hereby Given that Employers' Fire Insurance Company, The Automobile Insurance Company of Hartford and Westchester Fire Insurance Company hereby appeal to the Circuit Court of Appeals for the Ninth Circuit from the order denying each of said parties leave to intervene as party plaintiff in this action, entered in this action on July 28, 1947.

LONG & LEVIT

By William H. Levit

Attorneys for Intervenors and Appellants Employers' Fire Insurance Company, The Automobile Insurance Company of Hartford and Westchester Fire Insurance Company

[Endorsed]: Filed & mld. copies to Clarke C. Stephens, atty for deft, & Bishop & Hoffman, attys for plf. Aug. 27, 1947. [28]

ROYAL INDEMNITY COMPANY

Head Office: New York A New York Corporation

[Crest]

A Stock Company

Bond No. S 246537

In the District Court of the United States for the
Southern District of California
Central Division

No. 7046-B

CHARLES RUSCONI, as Administrator of the Estate
of Tillie Rusconi, sometimes known as T. Rusconi,
Mrs. Felippo Rusconi, Mrs. F. Rusconi and Mrs.
Philip Rusconi, Deceased; FELIPPO RUSCONI,
THELMA RUSCONI SMITH, EILLIEN RUS-
CONI GOODWIN and CHARLES RUSCONI,
Plaintiffs,

vs.

UNITED STATES OF AMERICA,

Defendant.

UNDERTAKING FOR COSTS ON APPEAL

Know All Men By These Presents, that Royal In-
demnity Company, a corporation, organized and existing
under the laws of the State of New York, and duly
licensed to transact business in the State of California,
is held and firmly bound unto Charles Rusconi, as ad-
ministrator of the Estate of Tillie Rusconi, sometimes
known as T. Rusconi, Mrs. Felippo Rusconi, Mrs. F. Rus-
coni and Mrs. Philip Rusconi, deceased; Felippo Rusconi,
Thelma Rusconi Smith, Eillien Rusconi Goodwin and

Charles Rusconi, plaintiffs, and United States of America, defendant in the above entitled case, in the penal sum of Two Hundred Fifty and no/100 (\$250.00) dollars, to be paid to said parties, their successors, assigns or legal representatives, for which payment well and truly to be made, the Royal Indemnity Company binds itself, its successors and assigns firmly by these presents.

The Condition of the Above Obligation Is Such, That Whereas, Employers' Fire Insurance Company, The Automobile Insurance Company of Hartford, and Westchester Fire Insurance Company, are about to take an appeal to the United States Circuit Court of Appeals for the Ninth Circuit to reverse the order of the United States District Court, Southern District of California, Central Division, made and entered on July 28, 1947 denying the motions of said parties to intervene as parties plaintiffs in this action.

Now, Therefore, if the above named appellants shall prosecute said appeal to effect and answer all costs which may be adjudged against them if the appeal is dismissed, or the order affirmed, or such costs as the Appellate Court may award if the order is modified, then this obligation shall be void; otherwise to remain in full force and effect.

It Is Hereby Agreed by the Surety that in case of default or contumacy on the part of the Principals or Surety, the Court may, upon notice to them of not less than ten days, proceed summarily and render order against them, or either of them, in accordance with their obligation and award execution thereon.

Signed, Sealed and Dated this 26th day of August.

The Premium Charged for This Bond Is \$10.00 Per Annum.

ROYAL INDEMNITY COMPANY

By A. A. Christian

Attorney in Fact

State of California,
County of Los Angeles—ss.

On this 26th day of August in the year 1947, before me. L. Hollingshead, a Notary Public in and for the County and State aforesaid, personally appeared A. A. Christian, known to me to be the person whose name is subscribed to the within instrument and known to me to be the Attorney-in-Fact of Royal Indemnity Company and acknowledged to me that he subscribed the name of said Company thereto as principal, and his own name as Attorney-in-Fact.

L. HOLLINGSHEAD

Notary Public in and for said County and State
My Commission Expires May 14, 1949.

Examined and recommended for approval as provided in Rule 8.

WILLIAM H. LEVIT

Attorney

I hereby approve the foregoing dated this 27 day of Aug., 1947.

EDMUND L. SMITH

Clerk U. S. District Court, Southern District
of California

By Edw. F. Drew

Deputy

[Endorsed]: Filed Aug. 27, 1947. [29]

[Title of District Court and Cause]

APPELLANTS' STATEMENT OF POINTS

Intervenors and appellants will rely upon the following points in the prosecution of their appeal from the order denying leave to intervene herein:

I.

The District Court erred as follows:

1. In denying intervenors' and appellants' motions to intervene as parties plaintiffs.

2. In holding that the Federal Tort Claims Act (28 U. S. C. sec. 931) does not permit suits by subrogees.

3. In holding that 31 U. S. C. sec. 203, which prohibits assignments of claims against the United States, is applicable to subrogated claim.

LONG & LEVIT

By William H. Levit

Attorneys for Intervenors and Appellants Employers'
Fire Ins. Co., The Automobile Ins. Co. of Hart-
ford, Westchester Fire Ins. Company. [30]

[Verified.] [31]

[Affidavit of Service by Mail.]

[Endorsed]: Filed Aug. 29, 1947. [32]

[Title of District Court and Cause]

CERTIFICATE OF CLERK

I, Edmund L. Smith, Clerk of the District Court of the United States for the Southern District of California, do hereby certify that the foregoing pages numbered from 1 to 36 inclusive contain full, true and correct copies of Complaint for Money; Summons; Motion by Employers' Fire Insurance Company et al. to Intervene as Plaintiffs; Affidavit of William H. Levit in Support of Motion to Intervene; Complaint in Intervention; Order; Notice of Appeal; Cost Bond on Appeal; Statement of Points and Designation of Record which constitute the record on appeal to the United States Circuit Court of Appeals for the Ninth Circuit.

I further certify that my fees for preparing, comparing, correcting and certifying the foregoing record amount to \$10.25 which sum has been paid to me by appellants.

Witness my hand and the seal of said District Court this 24 day of September, A. D. 1947.

(Seal)

EDMUND L. SMITH

Clerk

By Theodore Hocke

Chief Deputy Clerk

[Endorsed]: No. 11743. United States Circuit Court of Appeals for the Ninth Circuit. Employers' Fire Insurance Company, The Automobile Insurance Company of Hartford and Westchester Fire Insurance Company, Appellants, vs. United States of America, Charles Rusconi, as Administrator of the Estate of Tillie Rusconi, sometimes known as T. Rusconi, Mrs. Felippo Rusconi, Mrs. F. Rusconi and Mrs. Philip Rusconi, Deceased, Filippo Rusconi, Thelma Rusconi Smith, Eillien Rusconi Goodwin and Charles Rusconi, Appellees. Transcript of Record. Upon Appeal From the District Court of the United States for the Southern District of California, Central Division.

Filed September 25, 1947.

PAUL P. O'BRIEN,

Clerk of the United States Circuit Court of Appeals for
the Ninth Circuit.

In the Circuit Court of Appeals of the United States
in and for the Ninth Circuit

No. 11743

EMPLOYERS' FIRE INSURANCE COMPANY,
et al.,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLANTS' STATEMENT OF POINTS AND
DESIGNATION OF RECORD

Now come the Employers' Fire Insurance Company, The Automobile Insurance Company of Hartford, and Westchester Fire Insurance Company, appellants above named, and for their Statement of Points upon which they intend to rely in this appeal, adopt the Statement of Points filed by them in the United States District Court in connection with their Notice of Appeal and included in the transcript of record prepared and certified by the Clerk of said District Court.

Appellants designate the entire record herein to be printed.

LONG & LEVIT

By William H. Levit

Attorneys for Appellants

[Affidavits of Service by Mail.]

[Endorsed]: Filed Oct. 6, 1947. Paul P. O'Brien,
Clerk.